

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

MOTORISTS MUTUAL)	
INSURANCE COMPANY,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:22-cv-315
)	
HAROLD CHEVROLET BUICK, INC.)	
AND JEFF M. COUNTERMAN,)	
)	
Defendants.)	

COMPLAINT FOR DECLARATORY JUDGMENT

Motorists Mutual Insurance Company (“Motorists”), for its Complaint for Declaratory Judgment against Defendants Harold Chevrolet Buick, Inc. (“Harold Chevrolet”) and Jeff M. Counterman (“Counterman”) states as follows:

1. This Complaint is for declaratory judgment brought pursuant to 28 U.S.C. §2201 and Rule 57 of the Federal Rules of Civil Procedure.

THE PARTIES

2. Motorists is an insurance company organized and existing under the laws of Ohio with its principal place of business in Columbus, Ohio. Motorists is licensed to do business in the State of Indiana, and it is a citizen of Ohio.

3. Defendant Harold Chevrolet is an Indiana corporation with its principal place of business in Angola, Indiana. It is a citizen of Indiana.

4. Defendant Counterman is a citizen of Indiana.

JURISDICTION AND VENUE

5. This matter is a civil action for which the District Court of the United States has original jurisdiction because there exists a diversity of citizenship between the Plaintiff and the Defendants as provided in 28 U.S.C. §1332(a) and the amount in controversy exceeds the sum of \$75,000, exclusive of interest and costs.

6. The venue is proper in this judicial district pursuant to 28 U.S.C. §1391(b).

FACTS RELATING TO THE UNDERLYING ACTION

7. On February 24, 2022, Counterman filed his First Amended Complaint adding Harold Chevrolet to an existing lawsuit filed against General Motors, LLC (“General Motors”) in Steuben County Superior Court, Indiana, under Cause No. 76D01-2008-CT-000319 (“the Underlying Action”). A copy of the Amended Complaint filed in the Underlying Action is attached hereto as Exhibit A.

8. The Amended Complaint in the Underlying Action alleges that Counterman purchased a 2014 Chevrolet Silverado manufactured by General Motors from Harold Chevrolet as a new vehicle on August 14, 2014.

9. The Amended Complaint in the Underlying Action alleges that Counterman owned and operated Steuben County Welding which does steel frame construction work and custom welding within the farm community and that he allegedly utilized the Silverado every day and soon, after purchasing the Silverado, Counterman began suffering from arthritic stiffness and allergies, significant upper respiratory infection, congestion, chest pain, coughing and drainage, all of which were discovered in or around September 2015.

10. The Amended Complaint in the Underlying Action asserts that, after multiple treatments for such ailments, on November 2, 2016, Counterman underwent a five lobe lung surgery to surgically flush his lungs with a second surgery occurring on March 27, 2017.

11. The Amended Complaint in the Underlying Action alleges that, on two separate occasions, once in November 2018 and again on April 26, 2019, Counterman took multiple day cruises at which time he noticed that his health became restored.

12. The Amended Complaint in the Underlying Action alleges that, on May 20, 2019, Counterman retrieved his truck after being gone for over 22 days on a cruise from his girlfriend's house where it was parked outside. Counterman alleges that, when he opened the driver's side door, water poured out from the floor of the Silverado onto the ground from both front seats and the back seats, the first time he recognized or suspected a water leak of any type in the Silverado which was normally parked in a garage.

13. The Amended Complaint in the Underlying Action alleges that Counterman took his vehicle to Harold Chevrolet to be evaluated but, when Harold Chevrolet indicated a charge for their services or a repair might be necessary, Counterman then took it to a "local detail company" in Angola. That company allegedly discovered a defective drain tube in the Silverado which, according to Counterman, led to the existence of "black mold" in the carpet along the metal interior that also allegedly infiltrated into the seat foam of the Silverado.

14. The Amended Complaint in the Underlying Action alleges that, in May 2019, Counterman was informed by a pulmonologist that the black mold found in the truck prevented him from ever traveling in the Silverado, that his immune system had been compromised and that he suffers from asthma and chronic obstructive pulmonary disease as a result thereof.

15. The Amended Complaint in the Underlying Action asserts damages against General Motors for a violation of the Indiana Product Liability Act for strict liability and the following counts also against Harold Chevrolet including:

- Count II – Negligence against both Harold Chevrolet and GM. Counterman alleges that Harold Chevrolet breached its duty by failing to discover the defect in its pre-sale inspection, failing to discover the defect in its servicing of the vehicle after the sale and failing to notify Counterman of the defect after it knew or should have known of the defect.
- Count III – Breach of Warranty Against GM and Harold Chevrolet – Counterman alleges that his contract with the defendants extends express warranties to Counterman regarding the vehicle. He alleges that the law precludes a disclaimer of the implied warranty of merchantability as to consumer goods where an express warranty is given.
- Counterman requests damages to compensate him for his “serious permanent injuries,” for medical bills he has incurred, for future medical bills for an amount sufficient to compensate him for pain and suffering and emotional distress and an award to compensate him for the loss of the value of the truck, lost income and lost future income and diminution in impairment of his future earning capacities and pre-judgment interest.

THE MOTORISTS POLICY

16. Motorists issued an insurance policy to Ben Davis Chevrolet in which Harold Chevrolet is an additional named insured effective June 1, 2014 to June 1, 2015 (“the Motorists Policy”). A full and complete copy of the Motorists Policy is attached hereto as Exhibit B.

17. The Motorists Policy includes a Commercial General Liability Coverage Form which includes the following language in its insuring agreement:

SECTION I – COVERAGES

**COVERAGE A BODILY INJURY AND PROPERTY DAMAGE
LIABILITY**

1. Insuring Agreement

- a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result. But:

* * *

- b.** This insurance applies to “bodily injury” and “property damage” only if:
- (1)** The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;
 - (2)** The “bodily injury” or “property damage” occurs during the policy period; and
 - (3)** Prior to the policy period, no insured listed under Paragraph **1.** of Section **II** - Who Is An Insured and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, knew that the “bodily injury” or “property damage” had occurred, in whole or in part. If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change or resumption of such “bodily injury” or “property

damage” during or after the policy period will be deemed to have been known prior to the policy period.

- c. “Bodily injury” or “property damage” which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim, includes any continuation, change or resumption of that “bodily injury” or “property damage” after the end of the policy period.
- d. “Bodily injury” or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. Of Section II - Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim:

18. The Motorists Policy’s Commercial General Liability Coverage Form also includes the following exclusions:

2. Exclusions

This insurance does not apply to:

* * *

g. Aircraft, Auto Or Watercraft

“Bodily injury” or “property damage” arising out of the ownership, maintenance, use or entrustment to others of any aircraft, “auto” or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and “loading or unloading.”

* * *

k. Damage To Your Product

“Property damage” to “your product” arising out of it or any part of it.

l. Damage To Your Work

“Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard.”

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

19. The Motorists Policy also includes the following provisions in its Commercial General Liability Coverage Form:

SECTION V – DEFINITIONS

* * *

2. “Auto” means:

- a.** A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
- b.** Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.

However, “auto” does not include “mobile equipment”.

3. “Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

* * *

16. “Products-completed operations hazard”:

- a.** Includes all “bodily injury” and “property damage” occurring away from premises you own or rent and arising out of “your product” or “your work” except:
 - (1)** Products that are still in your physical possession; or

- (2) Work that has not yet been completed or abandoned. However, “your work” will be deemed completed at the earliest of the following times:

 - (a) When all of the work called for in your contract has been completed.
 - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
 - (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project. Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

- b. Does not include “bodily injury” or “property damage” arising out of:

* * *

- (3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

17. “Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it. For the purposes of this insurance, electronic data is not tangible property.

* * *

21. “Your product”:

a. Means:

- (1)** Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - (a)** You;
 - (b)** Others trading under your name; or
 - (c)** A person or organization whose business or assets you have acquired; and
- (2)** Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods, or products.

b. Includes:

- (1)** Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
- (2)** The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

22. “Your work”:

a. Means:

- (1)** Work or operations performed by you or on your behalf; and
- (2)** Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work,” and
- (2) The providing of or failure to provide warnings or instructions.

20. The Motorists Policy’s Commercial General Liability Coverage Form also includes the following endorsements:

Fungi Or Bacteria Exclusion CG 2167 (12-04)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

A. The following exclusion is added to Paragraph 2.

Exclusions of **Section I - Coverage A - Bodily Injury And Property Damage Liability:**

2. Exclusions

This insurance does not apply to:

Fungi or Bacteria

- a. “Bodily injury” or “property damage” which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any “fungi” or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.
- b. Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of,

“fungi” or bacteria, by any insured or by any other person or entity.

This exclusion does not apply to any “fungi” or bacteria that, are on, or are contained in, a good or product intended for bodily consumption.

B. The following exclusion is added to Paragraph 2.

Exclusions of Section I - Coverage B - Personal And Advertising Injury Liability:

2. Exclusions

This insurance does not apply to:

Fungi or Bacteria

- a.** “Personal and advertising injury” which would not have taken place, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any “fungi” or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury.
- b.** Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, “fungi” or bacteria, by any insured or by any other person or entity.

C. The following definition is added to the **Definitions** Section:

“Fungi” means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi.

* * *

Additional Condition - IL 7036 (03-04)

Two Or More Coverage Forms Or Policies Issued By Us.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the following:

BUSINESSOWNERS POLICY
COMMERCIAL GENERAL LIABILITY COVERAGE FORM
EMPLOYMENT PRACTICES LIABILITY INSURANCE

The following condition is added:

TWO OR MORE COVERAGE FORMS OR POLICIES ISSUED BY US.

If this coverage form or policy and any other form or policy issued to you by us, or any company affiliated with us, applies to the same “accident,” the aggregate maximum limit of insurance under all coverage forms or policies shall not exceed the highest applicable limit of insurance under any one coverage form or policy. This condition does not apply to any coverage form or policy issued by us or an affiliated company specifically to apply to excess insurance over this coverage form or policy.

21. The Motorists Policy also includes a Garage Coverage Form. The Garage Coverage Form includes the following language in its insuring agreement:

<i>Coverages</i>	<i>Covered Auto Symbols</i>	<i>Limit of Liability</i>
Liability	21	Garage Operations – Auto Only \$1,000,000 Each Accident Garage Operations – Other Than Auto Only \$1,000,000 Each Accident \$3,000,000 Aggregate

* * *

Garage Coverage Form CA 0005 (10-01)

* * *

SECTION I – COVERED AUTOS

ITEM TWO of the Declarations shows the “autos” that are covered “autos” for each of your coverages. The following numerical symbols

describe the “autos” that may be covered “autos.” The symbols entered next to a coverage on the Declarations designate the only “autos” that are covered “autos.”

A. Description Of Covered Auto Designation Symbols

SYMBOL DESCRIPTION

21 = ANY "AUTO."

* * *

SECTION II – LIABILITY COVERAGE

A. Coverage

1. “Garage Operations” - Other Than Covered “Autos”

- a.** We will pay all sums an “insured” legally must pay as damages because of “bodily injury” or “property damage” to which this insurance applies caused by an “accident” and resulting from “garage operations” other than the ownership, maintenance or use of covered “autos.”

We have the right and duty to defend any “insured” against a “suit” asking for these damages. However, we have no duty to defend any “insured” against a “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may investigate and settle any claim or “suit” as we consider appropriate. Our duty to defend or...

* * *

- b.** This insurance applies to “bodily injury” and “property damage” only if:

- (1)** The “accident” occurs in the coverage territory;
- (2)** The “bodily injury” or “property damage” occurs during the policy period; and
- (3)** Prior to the policy period, no “insured” listed under **Who Is An Insured** and no “employee” authorized by you to give or receive notice of an “accident” or

claim, knew that the “bodily injury” or “property damage” had occurred, in whole or in part. If such a listed “insured” or authorized “employee” knew, prior to the policy period, that the “bodily injury” occurred, then any continuation, change or resumption of such “bodily injury” or “property damage” during or after the policy period will be deemed to have been known prior to the policy period.

- c. “Bodily injury” or “property damage” which occurs during the policy period and was not, prior to the policy period, known to have occurred by any “insured” listed under **Who Is An Insured** or any “employee” authorized by you to give or receive notice of an “accident” or claim, includes any continuation, change or resumption of that “bodily injury” or “property damage” after the end of the policy period.

* * *

2. “Garage Operations” - Covered “Autos”

We will pay all sums an “insured” legally must pay as damages because of “bodily injury” or “property damage” to which this insurance applies, caused by an “accident” and resulting from “garage operations” involving the ownership, maintenance or use of covered “autos.”

- 22. The Motorists Policy’s Garage Coverage Form also includes the following exclusions:

B. Exclusions

This insurance does not apply to any of the following:

* * *

12. Defective Products

“Property damage” to any of your “products,” if caused by a defect existing in your “products” or any part of your “products,” at the time it was transferred to another.

13. Work You Performed

“Property damage” to “work you performed” if the “property damage” results from any part of the work itself or from the parts, materials or equipment used in connection with the work.

14. Loss Of Use

Loss of use of other property not physically damaged if caused by:

- a.** A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.
- b.** A defect, deficiency, inadequacy or dangerous condition in your “products” or “work you performed.” But this exclusion, **14.b.** does not apply if the loss of use was caused by sudden and accidental damage to or destruction of your “products” or “work you performed” after they have been put to their intended use.

15. Products Recall

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of your “products” or “work you performed” or other property of which they form a part, if such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

23. The Motorists Policy’s Garage Coverage Form also includes the following other provisions:

C. Limit of Insurance

1. Aggregate Limit Of Insurance – “Garage Operations” - Other Than Covered “Autos”

For “garage operations” other than the ownership, maintenance or use of covered “autos,” the following applies:

Regardless of the number of “insureds,” claims made or “suits” brought or persons or organizations making claims or bringing “suits,” the most we will pay for the sum of all damages involving “garage operations” other than “auto” is the Aggregate Limit of Insurance – “Garage Operations” - Other Than Covered “Autos” for Liability Coverage shown in the Declarations.

* * *

Damages payable under the Each “Accident” Limit of Insurance – “Garage Operations” - Other Than Covered “Autos” are not payable under the Each “Accident” Limit of Insurance – “Garage Operations” - Covered “Autos.”

* * *

All “bodily injury” and “property damage” resulting from continuous or repeated exposure to substantially the same conditions will be considered as resulting from one “accident.”

* * *

2. Limit Of Insurance – “Garage Operations” – Covered “Autos”

* * *

All “bodily injury,” “property damage” and “covered pollution cost or expense” resulting from continuous or repeated exposure to substantially the same conditions will be considered as resulting from one “accident.”

No one will be entitled to receive duplicate payments for the same elements of "loss" under this Coverage Form and any Medical Payments Coverage endorsement, Uninsured Motorists Coverage endorsement or Underinsured Motorists Coverage endorsement attached to this Coverage Part.

* * *

SECTION V – GARAGE CONDITIONS

The following conditions apply in addition to the Common Policy Conditions:

* * *

- 8.** Two Or More Coverage Forms Or Policies Issued By Us If this Coverage Form and any other Coverage Form or policy issued to you by us or any company affiliated with us apply to the same

“accident,” the aggregate maximum Limit of Insurance under all the Coverage Forms or policies shall not exceed the highest applicable Limit of Insurance under any one Coverage Form or policy. This condition does not apply to any Coverage Form or policy issued by us or an affiliated company specifically to apply as excess insurance over this Coverage Form.

SECTION VI – DEFINITIONS

- A.** “Accident” includes continuous or repeated exposure to the same conditions resulting in “bodily injury” or “property damage.”
- B.** “Auto” means a land motor vehicle, “trailer” or semitrailer.
- C.** “Bodily injury” means bodily injury, sickness or disease sustained by a person including death resulting from any of these.

* * *

- H.** “Garage operations” means the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations. “Garage operations” includes the ownership, maintenance or use of the “autos” indicated in SECTION I of this Coverage Form as covered “autos.” “Garage operations” also include all operations necessary or incidental to a garage business.

* * *

- N.** “Products” includes:
 - a.** The goods or products you made or sold in a garage business; and
 - b.** The providing of or failure to provide warnings or instructions.
- O.** “Property damage” means damage to or loss of use of tangible property.

* * *

- S.** “Work you performed” includes:
 - a.** Work that someone performed on your behalf; and

- b.** The providing of or failure to provide warnings or instructions.

* * *

Fungi Or Bacteria Exclusion CA 7082 (04-02)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the following:

GARAGE COVERAGE FORM

* * *

**PERSONAL INJURY LIABILITY - GARAGES
BROAD FORM GARAGE INSURANCE COVERAGE**

* * *

- A.** The following exclusion is added:

This insurance does not apply to:

FUNGI OR BACTERIA

- 1.** “Bodily injury,” “property damage,” “personal injury,” “advertising injury” or “personal and advertising injury” which would not have occurred or taken place, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any “fungi” or bacteria on or within a building, structure or “auto,” including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.
- 2.** Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, “fungi” or bacteria, by any insured or by any other person or entity. With regard to “bodily injury” or “property damage,” this exclusion does not apply to any “fungi” or bacteria that are, are on, or are contained in, a good or product intended for consumption.

B. The following definition is added:

“Fungi” means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi.

24. The Motorists Policy also includes a Commercial Umbrella Form which includes the following insuring agreement:

SECTION I – COVERAGES

A. Insuring Agreement.

We will pay on behalf of the insured the “ultimate net loss”:

- a.** In excess of the “underlying limit”: or
- b.** For an “occurrence” covered by this policy which is either excluded or not covered by the “underlying insurance”:

because of “bodily injury,” “property damage,” “personal injury” or “advertising injury” to which this Coverage Form applies, caused by an “occurrence” anywhere in the world.

* * *

This insurance applies to “bodily injury” and “property damage” only if:

- 1.** Prior to the policy period, no insured listed under Paragraph A. of Section III - Who Is An Insured and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, knew that the “bodily Injury” or “property damage” had occurred, in whole or in part. If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change or resumption of such “bodily injury” or “property damage” during or after the policy period will be deemed to have been known prior to the policy period.
- 2.** “Bodily injury” or “property damage” which occurs during the policy period and was not, prior to the policy period, known to

have occurred by any insured listed under Paragraph A. of Section III - Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim, includes any continuation, change or resumption of that “bodily injury” or “property damage” after the end of the policy period.

25. The Motorists Policy’s Commercial Umbrella Form also includes the following exclusions:

B. Exclusions

This insurance does not apply to:

* * *

- i.** “Property damage” to “your product” arising out of it or any part of it.
- j.** “Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard.”

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

- k.** “Property damage” to “impaired property” or property that has not been physically injured, arising out of:
 - (1)** A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or
 - (2)** A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

- l.** Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall,

inspection, repair, replacement, adjustment, removal or disposal of:

- (1) “Your product”;
- (2) “Your work”; or
- (3) “Impaired property”;

if such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

26. The Motorists Policy’s Commercial Umbrella Coverage Form also includes the following endorsements:

Automobile Liability Following Form CXSP FF16A

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the following:

COMMERCIAL UMBRELLA COVERAGE FORM

This insurance does not apply to claims, suits, actions or proceedings against the insured arising out of the ownership, operation, maintenance, use, loading or unloading of any “auto” unless coverage for such claims, suits, actions or proceedings is provided by applicable underlying insurance having limits as described in the Schedule of Underlying Insurance.

* * *

Fungi Or Bacteria Exclusion CXSP X100 (12-04)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the following:

COMMERCIAL UMBRELLA COVERAGE FORM

- A. It is agreed that no coverage is provided by the policy for claims, suits, actions or proceedings against the insured arising out of:
1. “Bodily injury,” “property damage,” “personal injury” or “advertising injury” which would not have occurred or taken place, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any “fungi” or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.
 2. Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, “fungi” or bacteria, by any insured or by any other person or entity.

With regard to “bodily injury” or “property damage,” this exclusion does not apply to any “fungi” or bacteria that are, are on, or are contained in, a good or product intended for bodily consumption.

- B. The following definition is added to the **DEFINITIONS** Section:

“Fungi” means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi.

27. The Motorists Policy’s Commercial Umbrella Coverage Form also includes the following definitions:

SECTION VI – DEFINITIONS

* * *

- G. “Occurrence” means:

1. An accident, or a happening or event, including, continuous or repeated exposure to conditions, which results in “bodily

injury” or “property damage” neither expected nor intended from the standpoint of the insured;

* * *

- I.1.** “Products-completed operations hazard” includes all “bodily injury” and “property damage” occurring away from premises you own or rent and arising out of “your product” or “your work” except:
 - a.** Products that are still in your physical possession; or
 - b.** Work that has not yet been completed or abandoned.
- 2.** “Your work” will be deemed completed at the earliest of the following times:
 - a.** When all work called for in your contract has been completed.
 - b.** When all work to be done at the site has been completed if your contract calls for work at more than one site.
 - c.** When the part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project. Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

* * *

- J.** “Property damage” means:
 - 1.** Physical injury to or destruction of tangible property which occurs during the policy period, including all resulting loss of use of that property;
 - 2.** Loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an “occurrence” during the policy period.
- K.** “Ultimate net loss” means the total of the following sums with respect to each “occurrence”:

All sums which the insured and his or her insurers shall become legally obligated to pay as damages, whether by final adjudication or settlement, after making proper deduction for all recoveries and salvages collectible.

- L.** “Underlying insurance” means policies listed in the Schedule of Underlying Insurance and other policies available to the insured applicable to the “occurrence.”

* * *

- N.** “Your product” means:

- 1.** Any goods or products, other than real property, manufactured, sold, handled or distributed or disposed of by:
 - a.** You;
 - b.** Others trading under your name; or
 - c.** A person or organization whose business or assets you have acquired; and
- 2.** Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

“Your product” includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in 1. and 2. above.

“Your product” does not include vending machines or other property rented to or located for the use of others but not sold.

- O.** “Your work” means:

- 1.** Work or operations performed by you or on your behalf; and
- 2.** Materials, parts or equipment furnished in connection with such work or operations.

“Your work” includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in 1. or 2. above.

REQUEST FOR DECLARATORY RELIEF

28. While Motorists has extended a defense under a reservation of rights to Harold Chevrolet for the Underlying Action, Motorists has no obligation to indemnify Harold Chevrolet for any judgment which may be entered against it for the Amended Complaint in the Underlying Action.

29. The Fungi and Mold Exclusion in the Motorists Policy’s Garage Coverage Form and the Commercial Umbrella Form applies to eliminate all coverage that might otherwise be available to Harold Chevrolet under the Motorists Policy in those two coverage forms. In addition, other exclusions in whole or in part bar coverage in those two coverage forms including for “property damage” arising from defective products, work Harold Chevrolet performed and loss of use.

30. Multiple exclusions exist to bar coverage under the Motorists Policy’s Commercial General Liability Coverage form, including exclusions for “bodily injury” or “property damages” arising out of an auto, and “property damage” arising out of Harold Chevrolet’s work or product.

31. Because the allegations in the Amended Complaint reference only damages that would not have occurred but for the exposure or presence of “fungi” or “bacteria” as defined in the Fungi of Mold Exclusion, no potential for insurance coverage exists and the defense for Harold Chevrolet by Motorists under a reservation of rights can also be withdrawn.

32. To the extent that the Court believes that there is either a genuine issue of material or that there are other damages that are alleged in the Amended Complaint in the Underlying

Action that do not fit within the Fungi or Bacteria Exclusion or any other relevant exclusion or condition, Motorists requests a determination that:

- a. Any damages that would not have occurred but for mold are excluded under the Motorists Policy;
- b. The Motorists Policy extends coverage for Harold Chevrolet for the Amended Complaint in the Underlying Action under the Garage Coverage Form only and Commercial Umbrella Form, not the Commercial General Liability Coverage Form.

WHEREFORE, Motorists Mutual Insurance Company requests that the Court make the following declarations:

- a. That the Motorists Policy does not extend coverage for Harold Chevrolet for the Underlying Action because the Fungi or Bacteria Exclusion applies to bar all such coverage;
- b. That, because all of the damages alleged by Counterman in the Underlying Action would not have occurred but for mold, which is specifically excluded under the Fungi or Bacteria Exclusion, there is no potential for coverage under the Motorists Policy and thus the defense to Harold Chevrolet can be withdrawn.

Furthermore, Plaintiff Motorists Mutual Insurance Company requests relief as designated in this Complaint, for costs of this action and for all other relief due and proper in the premises.

Respectfully submitted,

KIGHTLINGER & GRAY, LLP

By: s/ Ginny L. Peterson
Ginny L. Peterson, Attorney No. 20305-41
One Indiana Square, Suite 300
211 N. Pennsylvania Street

Indianapolis, IN 46204

Email: gpeterston@k-glau.com

Telephone: (317) 638-4521

Facsimile: (317) 636-5917

Attorneys for Plaintiff